

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
Implementation of Section 621(a)(1) of)
the Cable Communications Policy Act of 1984)
as amended by the Cable Television Consumer)
Protection and Competition Act of 1992)

MB Docket No. 05-311

COMMENTS OF THE VERMONT PUBLIC SERVICE BOARD
AND THE VERMONT DEPARTMENT OF PUBLIC SERVICE

The Vermont Public Service Board (PSB) and the Vermont Department of Public Service (VDPS) file these comments in the above-captioned proceeding to recommend that the Commission refrain from interfering with the local franchising process for video programming service providers. Vermont's authority to franchise cable operators and telecommunications companies offering video programming services is key to the State's ability to expand broadband service to unserved areas. In addition, State and local governments are well equipped and experienced to issue timely and appropriate local franchises for video programming service providers, including new entrants into the market. The PSB and VDPS offer the following facts and legal analysis of Vermont and federal law to guide the Commission in its determination of the issues in this proceeding.

Profile of Vermont

Vermont is a mountainous and mostly rural state with a population of approximately 621,000. The state's residents are spread throughout 251 cities, towns, and gores with populations ranging from zero in Avery's Gore to 39,000 in the City of Burlington. Thirteen cable companies currently operate in Vermont, and one new entrant, Burlington Telecom, is expected to begin offering services this year.

Most of the state's cable subscribers are served by a single cable operator with national presence.¹ The remaining cable systems are generally small and privately owned. One of the small

¹ Adelphia Cable Communications currently holds that position. Vermont expects that Comcast will take over and operate Adelphia's Vermont cable systems in the not too distant future.

cable systems is run by an affiliate of Waitsfield-Champlain Valley Telecom, an incumbent local exchange carrier.

The VDPS, PSB, and the Vermont Franchising Process

Vermont has a well-established and transparent process for obtaining a franchise to operate a cable television system in the state. The Vermont General Assembly vested the PSB with responsibility to issue all cable television franchises in the State. Vt. Stat. Ann. tit. 30, § 502(b). The PSB is a three-member body with powers of a court of record. *Id.* §§ 3(a), 9. PSB members are appointed and confirmed for six-year terms in the same manner as Vermont's judges are appointed and confirmed. *Id.* § 3(b), (c), (d). In addition to cable television franchising and associated regulation, the PSB regulates utility services provided in Vermont in conjunction with the VDPS. The VDPS represents the interests of the people of the State in proceedings before the PSB. *Id.* § 2(b). The VDPS also has a supervisory and prosecutorial role in utility and cable television matters before the PSB. *Id.* § 2(a). Both agencies are staffed with experts in fields relevant to their jurisdiction, such as electrical engineers, economists, telecommunications analysts, and consumer advocates.

Cable television companies must obtain a franchise from the PSB before offering their services to the State's residents. *Id.* § 503(a). The franchise is referred to and embodied in a "Certificate of Public Good" (CPG). *Id.* By statute, cable CPGs represent nonexclusive authority to serve the geographical areas listed in the certificate.² *Id.* § 504(d); see also 1987, No. 271 (Adj. Sess.), § 6 (clarifying that cable franchises are non-exclusive). Since 1988, cable CPGs must carry a term of eleven years. Vt. Stat. Ann. tit. 30, § 504(a). In contrast to local franchising negotiations elsewhere, Vermont state statutes and administrative rules govern most franchise obligations applicable to cable operators. See Vt. Stat. Ann. tit. 30, §§ 501-515; Vt. Pub. Serv. Bd. R. 8.000.³ The CPG (franchise) proceeding is conducted like other administrative adjudicatory proceedings over which the Public Service Board presides. Vt. Stat. Ann. tit. 30, § 503(b); see also *id.* § 231 (outlining general requirements for issuance of CPG by PSB). The cable operator and interested parties have

² Congress took similar action a few years later by amending the federal cable statutes to preclude exclusive cable television franchises. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 7(a)(1), 106 Stat. 1460, 1483 (1992).

³ The PSB's rules can be found on the web at: <http://www.state.vt.us/psb/rules/rules.stm>.

the opportunity for a hearing and may present evidence and argument to the PSB.⁴ Vt. Stat. Ann. tit. 3, §§ 809, 810.

State statutes and PSB rules set forth the criteria the PSB must consider when faced with a request for an initial, modified, or renewed cable franchise. See generally Vt. Stat. Ann. tit. 30, § 504(b); Vt. Pub. Serv. Bd. R. 8.200. Those criteria include the cable operator's experience and financial ability to provide cable service; the operator's billing, disconnection and deposit policies and practices; the quality of the cable operator's engineering and construction; whether the operator's construction practices comply with industry codes; the cable operator's plan for providing public, educational, and governmental access in the franchise territory; the policies and practices employed by the cable operator with respect to line extensions (with and without customer contribution); and the range and price of services the operator provides currently and expects to offer in the future. Vt. Stat. Ann. tit. 30, § 504(b). Rules promulgated pursuant to Vermont's Administrative Procedures Act complement the statutory scheme and further delineate the cable operator's franchise responsibilities. See, e.g., Pub. Serv. Bd. R. 8.231 (community needs assessment); 8.313 (line extension obligations and formula); 8.330 (telephone access); 8.340 (billing practices); 8.400 (requirements for public, educational, and governmental access).

That Vermont's franchising authority is central to the State's ability to promote broadband deployment is seen in the PSB's 2000 decision renewing Adelphia Cable Communications's Vermont franchises. In re Renewal of Certificates of Public Good held by Mountain Cable Co., Vt. PSB Docket No. 6101/6223, Order of 4/28/00.⁵ In its order in that docket, the PSB explained that critical to its renewal decision was Adelphia's commitment to extend its cable television services and broadband internet offerings to "almost a hundred thousand households across Vermont." *Id.* at 5. The PSB emphasized the importance of that commitment:

[W]e note that we stand on the brink of a vast expansion of the value that can be provided by combining the public right of way with a cable television provider's system. Adelphia is now beginning to offer a broadband Internet communications service. Until recently, such services have been available only to selected large-volume business users, measured by the dozens and hundreds in Vermont. Making broadband telecommunications available to Vermonters by the thousands—and by the hundreds of thousands—is an important

⁴ The process is a familiar one to regulated telecommunications companies, like Verizon, AT&T, and other potential new video programming entrants

⁵ The order is available on the PSB's website at:
<http://www.state.vt.us/psb/orders/document/61016223finalorder.pdf>

part of building Vermont's fundamental infrastructure for the next century.

Id. at 9. See also Vermont Telecommunications Plan 6-3 (Vt. Dep't. of Pub. Serv. 2004) (establishing State goal for broadband deployment, through cable modem, DSL, and comparable services, at 90% of Vermont homes and businesses by 2007).

To achieve its goals for communications infrastructure, the State's cable franchising law reasonably balances the interests of cable operators and cable television subscribers, obviating the need for any federal intervention. This balance is most readily seen in three areas: franchise fees, line extensions, and the right of condemnation.

Franchise Fees. Vermont imposes no "franchise fees" as federal law defines them. Instead, the Vermont Legislature has made available the maximum allowable franchise fee (5%) to fund public educational, and governmental (PEG) access production and programming in the State. In 2004, Vermont's access management organizations operating in Vermont's largest cable systems received nearly \$4 million in operating funding and almost \$500,000 in capital funds. That funding makes it possible for subscribers to receive a wide variety of PEG programming, which allows cable operators to differentiate themselves from competing satellite companies.

Line Extensions. Vermont has an economics-based policy for the extension of cable television lines in franchised areas. Vt. Pub. Serv. Bd. R. 8.313. The policy considers the population density in the subject area and the cable operator's costs of construction, including a reasonable return. Because Vermont still has areas without cable television service, the line extension policy is essential to push cable services out to those unserved areas and to facilitate the State's infrastructure goals.⁶ The policy does not require companies to build throughout their franchise areas if threshold density requirements are not met. For example, Adelphia Cable Communications holds a franchise for the neighboring towns of Avery's Gore, Warrens Gore, Warners Grant, and the Town of Lewis with a combined population of one. Adelphia is not legally required to extend its plant to those areas, however, unless and until the population density increases and meets the criteria in the company's approved line extension policy.

Right of Condemnation. As explained above, Vermont considers cable television to be an integral part of its strategy to extend broadband facilities to the most rural citizens. The eminent

⁶ To facilitate the extension of cable television lines, the PSB promulgated a rule to govern pole attachments. See Vt. Pub. Serv. Bd. R. 3.700. This rule establishes a level playing field for cable operators who wish to attach their plant to existing electric and telephone utility poles.

domain statute, see Vt. Stat. Ann. tit. 30, § 110, demonstrates just how important cable services are to the State of Vermont. The statute gives cable companies the right to commence condemnation proceedings if they require the use of another's real property to "render adequate service to the public in the conduct of its business."⁷ This is the same right possessed by Vermont's telecommunications companies and electric utilities.

Competitive Cable Systems

Vermont welcomes competition in the video programming services market. In fact, the State is no stranger to competitive cable systems. Most recently, the Vermont PSB issued a CPG to a new municipal cable venture doing business as Burlington Telecom. In re City of Burlington, Vt. PSB Docket No. 7044, Order of 9/13/05.⁸ Burlington Telecom, which is building its own facilities, will compete with Vermont's largest cable operator in the State's most populated city. The PSB has also granted CPGs for the same municipalities to different companies. For example, in 1990, the PSB granted a cable CPG to a competitor of the then-incumbent cable operator in the City of Newport, Vermont. In re Small Cities Cable of Newport, Inc., Vt. PSB Docket No. 5279, Order of 12/20/90. Multiple operators are also authorized to serve the towns of Berlin, Duxbury, Stowe, and Moretown. Although the PSB is not required to issue CPGs to all comers, it must assess CPG applications in accordance with state statute and PSB rules. Final PSB decisions on franchise applications are subject to judicial review under both state and federal law. See Vt. Stat. Ann. tit. 30, § 12 (providing Vermont Supreme Court review of any final decision of the PSB); 47 U.S.C. § 555 (giving state and federal courts jurisdiction to review local franchising decisions). Vermont has already demonstrated that it is capable of addressing issues arising in competitive franchises. Federal intervention into these local matters is, therefore, unnecessary.

The FCC's Statutory Role in Cable Franchising

Federal law gives the FCC virtually no role in cable franchising decisions. Although franchise decisions must conform to federal requirements, Congress recognized that local authorities were responsible for franchising decisions. 47 U.S.C. § 541(a). Indeed, Congress gave the judicial branch, not the FCC, the authority to review franchising decisions opposed by a cable operator. See 47 U.S.C. § 555 (providing that state and federal courts have jurisdiction over disputes arising from franchising decisions made pursuant to 47 U.S.C. § 541(a) (initial franchise), § 545 (modification of

⁷ Changing the eminent domain statute to include cable companies occurred in 1988 in the same Act that made cable franchises non-exclusive. See Vermont Cable Television Reform Act of 1988, 1987, No. 271 (Adj. Sess.), §17.

⁸ The CPG for Burlington Telecom can be found at: <http://www.state.vt.us/psb/orders/2005/files/7044fnlcp.pdf>

franchise obligations), and § 546 (franchise renewals)). Given Congress's clear intent to exclude the FCC from any role in reviewing franchise decisions, it is hard to fathom how the FCC could lawfully assert a role in this area.

Conclusions

The local cable franchising process functions well in Vermont. The Vermont PSB and the VDPS are experienced at working with cable providers to ensure that the needs of the State and local communities are met while taking into account the practical business needs of cable providers. Moreover, Vermont's franchising process is transparent and fair, and cable providers are afforded due process throughout the CPG proceeding. Vermont has already successfully grappled with issues related to competitive cable franchises and it will continue to do so when new entrants come to the Vermont market. The PSB and VDPS believe that federal intervention into local franchising processes is both unnecessary and unwarranted.

The PSB and VDPS therefore respectfully requests that the Commission refrain from taking any action that would interfere with State and local government authority over franchising or to otherwise impair the operation of the local franchising process that Congress contemplated when it enacted 47 U.S.C. § 541.

Respectfully submitted,

VERMONT PUBLIC SERVICE BOARD AND
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By 

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